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No. 68

IN THE

Supreme Court of the United States

OCTOBER TERM, 1937

PUGET SOUND STEVEDORING COMPANY,
Appellant,

vs.

THE TAX COMMISSION OF THE STATE OF WASHINGTON, and HAROLD H. HENNEFORD, THOMAS S. HEDGES and T. M. JENNER, Members of said Commission,
Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OF APPELLANT

BEN C. GROSSCUP,
JOHN AMBLER,
BERNARD H. LEVINSON,
Attorneys for Appellant.

Republic Building,
Seattle, Washington.

THE ARGUS PRESS, SEATTLE

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No. 68

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OF APPELLANT

JURISDICTION

This is an appeal from the Supreme Court of the State of Washington. Statement as to Jurisdiction was duly filed under Paragraph 1 of Rule 12 of the Revised Rules of the Supreme Court of the United States, and probable jurisdiction was noted by this court on June 1, 1937. The opinion in the court below is reported in 189 Washington , 63 Pacific (2d) 532.

STATEMENT OF THE CASE

Appellant in this action seeks to enjoin the imposition upon its gross receipts of the so-called Business and Occupation Tax created by Chapter 191, Laws of

Washington, 1933, as amended by Chapter 57, Laws of Washington Extraordinary Session, 1933, as amended by Chapter 180, Laws of Washington, 1935. The case is submitted on the pleadings. The complaint sets forth the facts in detail. The answer admits the facts and denies the right to the relief sought.

UNDISPUTED FACTS

Appellant Puget Sound Stevedoring Company is a Washington corporation engaged in the stevedoring business in the State of Washington. The term "stevedoring" is here used in its *strict* sense. By "stevedoring" is meant the transporting of cargo from the hold of a vessel to "first place of rest," or vice versa. All cargo while so transported is in *continuous movement* from the hold of a vessel to "first place of rest," or vice versa. All cargo while so transported is at the time in continuous movement in *interstate* or *foreign* commerce, being directly en route from or to an interstate or foreign point. The movement in interstate or foreign commerce has already begun at or before the time when appellant's services commence and such movement does not end until at or after appellant ends its services (R. 1, 5, 6).

"Stevedoring" may be described in more detail as follows:

Each hold of a vessel is worked by a crew of men who are commonly referred to as a "gang." A gang is usually composed of the following:

(a) Six men in the hold of the vessel.

(b) One or two winchdrivers, depending upon whether the vessel is equipped with double or single winches.

(c) A hatchtender or straw boss who supervises the work of the gang.

(d) Two "sling-up" men.

In discharging a vessel the hold men collect the cargo in the hold and place it upon a sling which is hoisted by the ship's gear from the hold, swung over the deck and lowered to the dock. At this point the ship's gear is disengaged by the "sling-up" men and the load is hauled away as a *continuous* operation to "first place of rest". Here stevedoring *ends* in the discharging process.

In loading a vessel the same method is employed as that outlined above save in the reverse order. When the cargo begins its *continuous* movement towards the ship's hold *stevedoring* begins. At ship's side the sling on which the cargo is resting is fastened by the "sling-up" men to the ship's tackle. The sling is then hoisted by the ship's gear over the side and across the deck and into the hold of the vessel. There the cargo is removed from the sling by the hold men and stowed in the hold (R. 6, 7).

By the term "first place of rest" is meant the point to which, or the point from which, the cargo moves *continuously* from or to the hold of the ship. As soon as the *continuity* of the movement ceases, the handling of the cargo ceases to be "stevedoring" (R. 7).

Under its bills of lading every vessel here under

consideration assumes the obligation *and cost* of stevedoring between the hold of a vessel and the reach of its tackle (R. 7).

The cost of stevedoring between ship's tackle and "first place of rest" in some trades is likewise absorbed in the vessel's freight rate (R. 7).

In other trades the costs of stevedoring between ship's tackle and "first place of rest" are billed as an extra charge to the shipper or consignee (R. 7).

Appellant is always employed by the ship owner or the ship's master (R. 4, 5). This is true whether stevedoring between ship's tackle and "first place of rest" is ultimately billed as an extra charge to the consignee or the shipper or absorbed in the vessel's freight rate (R. 7).

While appellant stevedores the cargoes for vessels under United States documentation engaged in the foreign, coastwise and intercoastal trade, the bulk of its work consists of discharging and loading cargoes received from or destined to vessels flying foreign flags (R. 6).

Appellant may arrange with a ship owner or ship master to stevedore a vessel in any one of the following three ways:

1. To discharge or load a vessel at a specified rate per ton of cargo handled. Appellant's own employees in this case perform the manual labor involved over whom it exercises control and whose operations it directs under the general instructions and supervision of the ship's master.

2. To discharge or load a vessel on a cost plus basis. Here again, appellant's own employees perform

the manual labor involved over whom it exercises control and whose operations it directs under the general instructions and supervision of the ship's master. This method differs from (1) above only in the fact that the computation of compensation is on a different basis.

3. To *arrange* for stevedoring by securing for the ship owner or ship master longshoremen to perform the manual labor. Appellant in this case does not control or direct the operations. The ship's officers assume complete supervision and direction, the longshoremen working as direct employees of the vessel and owners. Appellant at the conclusion of such an operation advances the pay-roll to pay off the longshoremen, later billing the vessel and her owner the amount of the pay-roll so advanced, plus a commission for its services (R. 4, 5).

Stevedoring was once exclusively performed by the crew of the vessel. This is now quite rare because of larger vessels, smaller crews, faster schedules, and the presence of experienced stevedores in every port.

Stevedoring is admittedly an essential link in and component part of water-borne commerce (R. 8). Exhibit A, attached to the complaint in this case, says in part:

> "* * * Any interruption of the service of such cargo handlers cripples the activities and business of a port and the free and steady flow of commerce and trade through the port is sharply and abruptly slowed, hindered and obstructed." (R. 8)

This is not denied.

Transportation by water is sometimes carried on in what may be termed an *integrated* operation in so far as stevedoring is concerned. In such case ship owners employ no stevedoring company at all. The stevedoring operation for their vessels is performed with their own employees and under their own management as a part of their general operations (R. 6).

A ship owner may, on the other hand, find that the scope of his operations is such that stevedoring of his vessels may be more efficiently, economically and satisfactorily performed by the employment of a stevedoring company to perform the operation, including both the actual labor and the supervision (R. 4, 5).

As a method partaking somewhat of the elements of each, a ship owner may merely employ a stevedoring company to arrange for stevedoring by securing longshoremen to work under the direction of the ship's officers (R. 5).

STATUTES CHALLENGED

Chapter 191, Laws of Washington 1933, "An act relating to taxation; imposing taxes upon the privilege of engaging in business activities, etc.," provides in part as follows:

> "Sec. 2. (2) From and after the first day of August, 1933, and until the thirty-first day of July, 1935, there is hereby levied and there shall be collected from every person an *annual tax or excise for the privilege of engaging in business activities.* Such tax or excise shall be measured by the application of rates against values, gross proceeds of sales, or *gross income*, as the case *may be, as follows*: * * *" (Italics ours.)
>
> "Sec. 3. If any person shall engage or continue in any business or performance of any function for which a *privilege tax* is imposed by this act, he shall be deemed to have applied for and to have duly obtained from the State of Washington *a license under this act to engage in and to conduct such business or perform such function* for the current tax year, upon the condition that he shall pay the tax accruing to the State of Washington under the provisions of this act; and he shall hereby be duly licensed to engage in and conduct such business or perform such a function." (Italics ours)

Chapter 57, Laws of Washington Extraordinary Session 1933, amending the earlier Act above, provides as follows:

> "Section 2-a. (1) From and after the first day of January, 1934, and until the thirty-first day

of July, 1935, there is hereby levied and there shall be collected from every person engaging or continuing within this state in the business of rendering or performing services, professional or otherwise, and from every person engaging or continuing within this state in any business not specifically taxable under section 2 of this act, *an annual tax or excise* for the *privilege of engaging* in such business; as to such persons the amount of the tax or excise shall be equal to the *gross income* of the business multiplied by the rate of five-tenths of one per cent; * * *"

Chapter 180, Laws of Washington 1935, "An Act relating to revenue and taxation; providing for the levy and collection of a tax or excise upon the act or privilege of engaging in business activities, etc.," superseding the two earlier Acts, provides as follows:

"Sec. 4. From and after the first day of May, 1935, there is hereby levied and there shall be collected from every person *a tax for the act or privilege of engaging in business activities.* Such tax shall be measured by the application of rates against value of products, gross proceeds of sales, or gross income of the business, as the case may be, as follows: * * *"

"(e) Upon every person engaging within this state in any business activity other than or in addition to those enumerated in subsections (a), (b), (c) and (d) above; as to such persons the amount of tax on account of such activities shall

be equal to the gross income of the business multiplied by the rate of one-half of one per cent. This subsection includes, among others, and without limiting the scope hereof, persons engaged in the following businesses (whether or not title to materials used in the performance of such businesses passes to another by accession, confusion or other than by outright sale); repairing, personal, business, professional, mechanical and educational service businesses; abstract and title, insurance, financial, brokerage, construction contracting and sub-contracting, advertising and hotel businesses."

"Sec. 187. If any person shall engage in any business or perform any act for which a tax is imposed by this act, he shall * * * apply for and obtain from the commission, upon the payment of a fee of one dollar, *a registration certificate* for each calendar year, or portion thereof. Said registration certificate shall be personal and non-transferable and shall expire on the last day of the calendar year for which issued and shall be renewed annually upon the condition that the taxpayer shall pay the aforesaid registration fee *and the tax accrued to the state under the provisions of this act.* * * * No person shall engage in any business taxable hereunder without being registered in compliance with the provisions of this section." (Italics ours)

See Appendix I for a more detailed analysis of the statutes involved.

ASSIGNED ERRORS RELIED UPON

1. The Supreme Court of the State of Washington erred in failing to hold that the operations of the appellant in handling cargo in continuous movement in Interstate and Foreign Commerce from the hold of a vessel to first place of rest and *vice versa* form an essential and component part of and an essential link in Interstate and Foreign Commerce (R. 20).

2. The Supreme Court of the State of Washington by its judgment erred in failing to hold that the appellant is engaged solely in Interstate and Foreign Commerce (R. 20).

3. The Supreme Court of the State of Washington by its judgment erred in holding that appellant is not a necessary factor in Interstate and Foreign Commerce but merely renders an independent service of advantage to those actually forming a necessary component part or link in such commerce (R. 20).

4. The Supreme Court of the State of Washington by its judgment erred in holding that the imposition upon and collection from the appellant of the Business and Occupation Tax (Chapter 191 Laws of Washington 1933, as amended by Chapter 57 Laws of Washington Extraordinary Session 1933 and Chapter 180 Laws of Washington 1935) upon its gross income does not impose a burden, hindrance or obstruction upon Interstate and Foreign Commerce in violation of Article I, Section 8, of the Constitution of the United States (R. 20).

5. The Supreme Court of the State of Washington by its judgment erred in holding that the imposition

of said Business and Occupation Tax upon appellant, and not upon a ship-owner doing its own stevedoring, does not deprive the appellant of the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States (R. 20-21).

6. The Supreme Court of the State of Washington in its judgment erred in failing to hold that the imposition of said Business and Occupational Tax upon appellant's gross income is an unlawful and illegal burden, hindrance and obstruction upon Interstate and Foreign Commerce, in violation of Article I, Section 8, of the Constitution of the United States (R. 21).

7. The Supreme Court of the State of Washington by its judgment erred in failing to hold that the imposition of the Business and Occupation Tax upon appellant's operations and not upon a ship-owner doing its own stevedoring deprives the appellant of the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States (R. 21).

8. The Supreme Court of the State of Washintgon by its judgment erred in affirming the judgment of the Superior Court of Thurston County, Washington, denying injunctive relief against the imposition and collection of the Business and Occupation Tax upon appellant's gross income, and in dismissing the action filed by the appellant and granting judgment in favor of the appellees (R. 21).

9. The Supreme Court of the State of Washington

by its judgment erred in failing to grant to appellant relief sought in this action and in failing to grant judgment in its favor (R. 21).

GENERAL PRINCIPLES INVOLVED

These statutes have been before the Supreme Court of the State of Washington and before this court in several cases. From these decisions the nature and character of the tax is now firmly established. The tax is not a property tax. It is an excise or occupation tax imposed upon the *privilege* of doing business. The tax is imposed for *revenue*, not for *regulation*. The tax is measured by and imposed upon *gross receipts* derived from the doing of business.

State ex rel. Stiner v. Yelle, 174 Wash. 402, 25 P. (2d) 91;

Supply Laundry v. Jenner, 178 Wash. 72, 34 P. (2d) 363;

Pacific Telephone & Telegraph Co. v. Tax Commission, 183 Wash. 697, 48 P. (2d) 938, affirmed 297 U. S. 403;

Fishers Blend Station v. State Tax Commission, 182 Wash. 163, 45 P. (2d) 942, reversed 297 U. S. 650;

Paramount v. Henneford, 184 Wash. 376, 51 P. (2d) 385; Certiorari denied 298 U. S. 665.

It is well settled that a state may not directly tax the privilege of engaging in interstate or foreign

commerce nor may it place a direct tax on the gross receipts from such commerce.

Philadelphia S. S. Co v. Pennsylvania, 122 U. S. 326;

Leloup v. Port of Mobile, 127 U. S. 640;

Galveston v. Texas, 210 U. S. 217;

Crew Levick Co. v. Pennsylvania, 245 U. S. 292;

U. S. Glue Co. v. Oak Creek, 247 U. S. 321;

Helson v. Kentucky, 279 U. S. 245;

New Jersey Bell Tel. Co. v. State, 280 U. S. 338;

East Ohio Gas Co. v. Tax Commission, 283 U. S. 465;

Virginia v. Imperial Coal Co., 293 U. S. 15;

Pacific Telephone & Telegraph Co., v. Tax Commission, 183 Wash. 697, 48 P. (2d) 938, affirmed 297 U. S. 403, *supra;*

Fishers Blend Station v. State Tax Commission, 182 Wash. 163, 45 P. (2d) 942, reversed 297 U. S. 650, *supra.*

Where there is no constitutional basis for the tax it is void even in the absence of legislation by Congress or a finding of prejudice.

Pacific Telephone & Telegraph Co. v. Tax Commission, supra.

See:

Alpha Cement Co. v. Massachusetts, 268 U. S. 203;

Cudahy v. Hinkle, 278 U. S. 460.

ARGUMENT

I. IMPOSITION OF THE TAX VIOLATES THE COMMERCE CLAUSE

A. Stevedoring Is Interstate and Foreign Commerce

Stevedoring here involved is limited to the transportation of cargoes *then moving continuously* in interstate or foreign commerce. Stevedoring has always been recognized as a distinct link in the chain of maritime commerce. In earlier days the crew performed this essential step in transportation.

In *The Senator*, 21 Fed. 191, the court, speaking of "stevedoring", said (p. 191):

> "* * * The demand for such service cannot be fulfilled by the common laborer; hence they have become so connected with navigation, to load as well as unload vessels, that they are regarded as a *part of the maritime machinery* for the commerce of the lakes. They perform an *indispensable part of the transportation* and delivery of a cargo,—to begin it and conclude it. If services intermediate are regarded as maritime, why not the commencing and closing service?" (Italics ours)

Again, in *Florez v. The Scotia*, 35 Fed. 916, the court said (p. 916):

> "* * * *The work of unloading is undeniably a maritime service.* It is a part of the performance of the vessel's maritime contract of carriage, and necessary to enable the ship to earn her freight. It is, therefore, *not merely a service* to the ship, but a *necessary service.*" (Italics ours)

So, again, in *The Main*, 51 Fed. 954, the court used the following language (p. 957):

> "* * * It must be conceded that when the ship has finished its transit, and arrived at its port of destination, the *cargo must be unloaded.* It must also be conceded that cargo delivered on the wharf, and received by the master for outward voyage, is at the risk of the ship, and *must be loaded.* These are services that the master is *compelled* to have performed. * * * Stowage of cargo is primarily a duty of the master, but is now generally performed by a stevedore, and it is a very important service to the ship; for on it depends the safe carrying of the cargo, and frequently the safety of the ship." (Italics ours)

This court in *International Stevedoring Co. v. Haverty*, 272 U. S. 50, said (p. 52):

> "It is true that for most purposes, as the word is commonly used, stevedores are not 'seamen.' But words are flexible. The work upon which the plaintiff was engaged was a maritime service formerly rendered by the ship's crew."

In *Michigan Furniture Co. v. Southern Pacific Co.*, 287 N. Y. S. 178, the principles thus well established are summed up as follows (p. 181):

> "The courts have explicitly held that loading and stowing a cargo on ship is a maritime service; that it involves the safety of the ship; that it is a *service formerly performed by members of the crew;* but that the exigencies of increasing commerce demanded the specialized service which has devolved upon a class as clearly identified

with maritime affairs as are the mariners." (Italics ours)

It is at once apparent that loading a vessel in preparation for her departure, and discharging a vessel upon her arrival at destination are essentially part of interstate and foreign commerce.

In *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, the State of Pennsylvania attempted to collect a capital tax on the capital stock of a New Jersey corporation operating a ferry from Gloucester, New Jersey, to Philadelphia. The ferry company's only property in the State of Pennsylvania was a leased wharf at which it loaded and discharged cargo and picked up and landed passengers. The lower court held that the ferry company was doing business within the State of Pennsylvania as it received and landed passengers and freight on a wharf within that state. This, as the lower court held, was sufficient to make the capital stock tax applicable. In reversing the lower court and in holding the tax unconstitutional this court said (p. 203):

> "* * * Transportation implies the *taking up* of persons or property at some point and *putting them down* at another. *A tax, therefore, upon such receiving and landing of passengers and freight is a tax upon their transportation;* that is, upon the commerce between the two states involved in such transportation." (Italics ours)

Also (at pages 213-214):

> "* * * Receiving and landing passengers and freight is incident to their transportation. With-

out both there could be no such thing as their transportation across the river Delaware. The transportation, as to passengers, is not completed until, as said in the *Henderson* case, they are disembarked at the pier of the city to which they are carried; and, as to freight, until it is landed upon such pier. And *all restraints* by exactions *in the form of taxes upon such transportation, or upon acts necessary to its completion*, are so many invasions of the exclusive power of Congress to regulate that portion of commerce between the States." (Italics ours)

The principle of the above case was followed in *Rhodes v. Iowa*, 170 U. S. 412. An Iowa statute provided a penalty for transportation of intoxicating liquor from one point to another in the state. A shipment was made from Illinois to a point in Iowa on a through bill of lading. On its arrival the station agent of the railroad company moved the box from *the platform* into a *freight warehouse*. The court, in reversing the conviction of the station agent, said (p. 426):

"It follows from this conclusion that as the act for which the plaintiff in error was convicted, and which consisted in *moving the goods from the platform to the freight warehouse, was a part of the interstate commerce transportation*, and was done before the law of Iowa could constitutionally attach to the goods, the conviction was erroneous, and the judgment below is, therefore, reversed." (Italics ours)

In *Whitfield v. Ohio*, 297 U. S. 431, at page 439,

this court, recognizing the rules of the above cases, said:

> "* * * The interstate transaction in its fundamental aspect ends upon delivery to the consignee."

The *continuity* or lack of continuity of the movement of cargo determines its character as being in interstate or foreign commerce on the one hand, or in intra-state commerce on the other. If in the latter category it is subject to state taxation. If in the former, it may not be taxed.

Carson Petroleum Co. v. Vial, 279 U. S. 95;
Pennsylvania Railroad v. P. U. Commission, 298 U. S. 170.

A change in the mode of transportation from the vessel to a stevedore's truck does not break the continuity of the movement.

Hughes v. Minnesota, 272 U. S. 469.

Whether stevedoring costs are entirely absorbed by the vessel or are in part passed on to the shipper or consignee is immaterial in determining whether stevedoring is interstate or foreign commerce.

United States v. Erie, 280 U. S. 98.

The admitted facts clearly demonstrate that stevedoring is an essential and component part of and link in the chain of interstate and foreign commerce. When stevedoring is performed by a ship owner for his own vessels neither appellees nor the court below deny that it is a part of interstate and foreign commerce and beyond the regulatory or taxing powers of the state.

In *Luckenbach v. Denney*, 152 Wash. 548, 278 Pac.

419, the Supreme Court of the State of Washington, in a case involving an attempt on the part of the State of Washington to regulate the business of operating a dock used by an interstate carrier in loading, discharging and handling cargoes to and from its own ships, said (p. 557):

> "It is fundamental that the authority to regulate and control interstate commerce cannot be divided and that the authority of the United States is absolute."

And at page 558:

> "Under the conditions existing in this case, one of the '*component parts*' of the interstate commerce conducted by respondent is handling goods upon its own dock when carried in interstate commerce." (Italics ours)

The right of the state to regulate such dock operations was denied.

It will be noticed that the operation of a dock and the handling of cargo on a dock are one step *further removed* from commerce than are most of the stevedoring operations here under consideration.

Appellees contended below, and the court below found, that a different rule exists where stevedoring is performed by an *independent local* agency, such as appellant.

B. The Opinion of the Court Below

The court below said:

> "Appellant argues that as it actually participates in the movement of interstate and foreign commerce and as the tax is upon the gross re-

ceipts from such commerce, it is a direct tax upon every ton of cargo moved and, hence, is unconstitutional according to *McCall v. California*, 136 U. S. 104; *Texas Transport & Terminal Co. v. New Orleans*, 264 U. S. 150, and *Di Santo v. Pennsylvania*, 273 U. S. 34. Without detailing the facts of these three cases it is noted that each involves the imposition of a *license* tax directly upon the *carrier* of interstate and foreign commerce * * *." (Italics ours) (R. 25).

This statement implies that there was a difference in the *nature of the tax* involved in the three cases cited and the tax here under discussion. *This is not the fact.* A license tax for *revenue* and an occupation tax are essentially the same. It is only when a license tax is imposed for *regulation* and not, primarily, for *revenue* that a difference need be recognized.

Royall v. Virginia, 116 U. S. 572, 579;
Cooley, Taxation, 4th Ed., §1675.

For example, in the Business and Occupation Tax here involved, Chapter 191, Laws of Washington 1933, Section 3, provides for a *license;* Section 23 forbids any person to fail or refuse to obtain the *license;* Chapter 180, Laws of Washington 1935, Section 187, provides for a *registration certificate*, and Section 203 imposes a penalty when any one engages in business without having obtained such a *registration certificate.*

In *McCall v. California*, 136 U. S. 104, and *Texas Transp. Co. v. New Orleans*, 264 U. S. 150, the licenses mentioned, like the Washington license, or reg-

istration certificate, were merely receipts for the tax, not a part of a system of *regulation.*

Royall v. Virginia, supra.

Di Santo v. Pennsylvania, 273 U. S. 34, alone of the three cases involved *regulation.*

Again the tax was no more *on the carrier* in the sense that it fell on the steamship companies employing the Texas Transport Co. or Di Santo than the instant tax is on the ship owner or ship master employing appellant. This will be shown more clearly in the subsequent discussion.

The instant tax does fall directly on a *carrier* as appellant is a connecting *carrier* fulfilling part of the interstate or foreign haul.

The court below again said:

> "* * * In this case the tax is not imposed upon, or because of the kind of business appellant is engaged in, but rather upon the act or privilege of engaging in business activities without regard to its kind or nature * * *."
>
> "Bearing in mind that the business and occupational tax contained in the state revenue act imposes, indiscriminately, an excise tax upon every person for the privilege of doing business in this state * * *." (R. 25).

The fact that the Business and Occupation Tax of the State of Washington is a *general* revenue tax measure of that state, while a fact to be considered in determining the validity of the tax, has little or no direct bearing upon the issue here involved. The taxes

declared unconstitutional were of a general character in

Moran v. New Orleans, 112 U. S. 69;
McCall v. California, 136 U. S. 104;
Spalding v. Edwards, 262 U. S. 66;
Texas Transp. Co. v. New Orleans, 264 U. S. 150;
State v. Tampa, 266 U. S. 594;
Fishers Blend Station v. State Tax Commission, 182 Wash. 163, 45 P. (2d) 942, reversed 297 U. S. 650, *supra*.

In *State v. Tampa, supra*, the tax which was declared by this court to be unconstitutional, was imposed under the general provision of the Louisiana statute of 1920 which imposed a tax on any business with respect to which no provision had been expressly made.

The court below again said:

> "Bearing in mind * * * that appellant is a *domestic* corporation operating an *independent* business *entirely within this state* * * *." (R. 25)

That appellant is a domestic corporation is wholly immaterial in the present controversy. A state may not impose an unconstitutional tax even in the case of domestic corporations.

Philadelphia S. S. Co. v. Pennsylvania, 122 U. S. 326 at page 342;
Ozark Pipe Line v. Monier, 266 U. S. 555, at 567.

That appellant's operations are conducted entirely in the State of Washington does not affect their interstate or foreign character.

The Daniel Ball, 10 Wall. 557;
Morrison Mill Co. v. Hartford Fire Ins., 32 F. (2d) 271; aff. 35 F. (2d) 862;
Foster v. Davenport, 22 How. 244;
Moran v. New Orleans, 112 U. S. 69;
Harman v. Chicago, 147 U. S. 396;
United States v. Great Lakes, 208 Fed. 733;
People v. Miller, 178 N. Y. 194, 70 N. E. 472;
Texas Transp. Co. v. New Orleans, 264 U. S. 150, *supra;*
State v. Tampa Interocean Co., 266 U. S. 594, *supra;*
Di Santo v. Pennsylvania, 273 U. S. 34;
Fishers Blend Station v. State Tax Commission, 182 Wash. 163, 45 P. (2d) 942, reversed 297 U. S. 650, *supra;*
State v. Murray, 26 Ala. App. 90, 153 So. 667;
United States v. California, 297 U. S. 175.

The court below again said:

"Bearing in mind * * * that the tax is not upon imports, exports or interstate or foreign commerce and that appellant is not a necessary factor in such commerce but has built up and renders an independent service which is advantageous to those who actually form a necessary and component part or link in such commerce, it is inconceivable that the imposition of such an excise conflicts or is inconsistent with any federal or state constitutional provision." (R. 25)

State regulation and taxation were found to be

unconstitutional under similar circumstances in the following cases:

Foster v. Davenport, 22 How. 244, *supra;*
Moran v. New Orleans, 112 U. S. 69, *supra;*
People v. Miller, 178 N. Y. 194, 70 N. E. 472, *supra;*
Texas Transp. Co. v. New Orleans, 264 U. S. 150, *supra;*
State v. Tampa Interocean Co., 266 U. S. 594, *supra;*
Di Santo v. Pennsylvania, 273 U. S. 34, *supra;*
State v. Murray, 26 Ala. App. 90, 153 So. 667, *supra.*

In *Foster v. Davenport, supra*, the State of Alabama enacted a statute imposing certain regulations on steamboats navigating the waters of the State. The Act had been found unconstitutional as applied to vessels engaged in interstate and foreign commerce, but it was urged that a steamboat exclusively engaged in lightering goods from and to vessels anchored in Mobile Bay, in the State of Alabama, and in towing vessels from the City to the Bay and, on occasion, out into the Gulf, was engaged in domestic commerce and thus subject to state regulation. This court said (p. 246):

> "It is quite apparent, from the facts admitted in the case, that this steamboat was employed *in aid of vessels engaged in the foreign or coastwise trade* and commerce of the United States, either in the delivery of their cargoes, or in towing the

vessels themselves to the Port of Mobile. The character of navigation and business in which it was employed cannot be distinguished from that in which the vessels it towed or unloaded were engaged. * * *" (Italics ours)

State regulation was forbidden. The vessel involved was apparently locally owned and independently operated. It apparently had no connection whatsoever with the vessels it lightered or towed except to perform the service.

The same rule was followed in *Moran v. New Orleans, supra,* involving a *license tax for revenue* of the City of New Orleans imposed upon tow boats towing vessels between the City of New Orleans and the Gulf of Mexico. The facts were similar to those in *Foster v. Davenport, supra,* and state *taxation* was forbidden. Here again, the towboats appear to have been independently locally owned and operated.

In *People v. Miller, supra,* the State of New York attempted to impose a tax upon the gross receipts of a domestic corporation incorporated as a railroad company, but which in fact conducted a limited local operation described in the opinion as follows (p. 473):

"* * * The *entire business* is transacted in Buffalo, and *consists in loading and unloading* and storing grain and other freights, which, on the one hand, *come from places outside of the state and are destined for points in the state or elsewhere,* and, on the other, which come from points in the state and are destined to places in other states. It handles *no local freight* whatever. All

its receipts are from such business, and come from the payment to it by the several companies or carriers who employ it of fixed charges per bushel on the grain handled and a fixed rate per ton on the package freight, which charges include elevator service and the use of the yards for car storage and car service over its tracks. These charges also cover a 10 days' storage privilege, and for freights remaining longer than that an additional storage charge is made * * *." (Italics ours)

The court continued the description of the taxpayer's business by emphasizing the following (p. 473):

"* * * Its principal business operations consist in the trans-shipment of grain which it takes into its elevator from boats or water craft upon the river or land and discharges into cars to be carried by railroads to New York and other ports on the Atlantic seaboard. In this way it moves the freight or property, whatever it may consist of, about 500 feet, and only that part of the route is covered by the relator's operations, whether the freight is destined for the East or the West. *It may be assumed from the nature of the business that the property is carried under bills of lading from the point of shipment to the point of ultimate destination, and the relator is employed by the carriers to aid in the transportation of the property at Buffalo.*" (Italics ours)

The tax was held unconstitutional although the domestic corporation was conducting a wholly independ-

ent business entirely in one state but forming a link in the through transportation of goods.

As indicated above (p. 21) two leading decisions, *Texas Transp. Co. v. New Orleans*, *supra*, and *Di Santo v. Pennsylvania*. *supra*, each having a direct bearing on the issues here involved, were brushed aside by the lower court in language showing an utter misconception of the holding in each.

In *City of New Orleans v. Texas Transp. Co.*, 152 La. 497, 93 So. 751, an ordinance of the City of New Orleans imposed a tax for *revenue* upon "every business, trade or occupation that is subject to taxation." The tax upon steamship agents was graded according to annual *gross* receipts. The tax was $400.00 if such receipts equalled $100,000.00 or more annually. The receipts of the Texas Transport Co. exceeded that amount and its annual tax was thus *fixed* at $400.00. While the company had several offices, its local business at New Orleans was all that was involved in the tax proceeding. Its local business was entirely confined to dealings "with ship owners, charterers and operators of vessels in interstate and foreign commerce." It had four regular patrons, by way of steamship companies, under contract who each paid a commission based on gross freights collected by the company for their respective vessels. The company occasionally handled the business of isolated tankers or tramp ships on a lump sum basis. The company did not own, charter or operate ships or have any interlocking arrangements with its patrons for pooling or sharing earnings, gains or losses. The company performed for their patrons the numerous cus-

tomary duties of a steamship agent which included solicitation of cargo, acceptance of cargo on the wharf, "arranging with stevedores for discharging and loading cargo," issuance of bills of lading, payments of disbursements, handling immigration matters, etc., etc. The Louisiana court, in upholding the imposition of the tax, in a carefully considered opinion, said in part (p. 752):

> "The business of steamship agents is an extensive business in New Orleans, as it is in every large seaport. As a separate or an *independent business*, it is a result of the development of the country's commerce with foreign nations and among the several states, in the early days, when time was not so much the object or subject of economy as it is today, *every ship's captain, for his own ship, discharged the duties and rendered the services* for which *local steamship agents* are employed nowadays. But it would be impracticable now for a ship's captain to remain with his ship in port long enough to attend to the many matters which the local steamship agents can and do attend to for a ship at sea or in a foreign port. The business of steamship agents is therefore a *necessary adjunct* to commerce on the high seas." (Italics ours)

The Louisiana court recognized that in *McCall v. California*, 136 U. S. 104, this court held that an employee of an interstate railroad company soliciting passenger traffic could not be subjected to a license tax for revenue. The Louisiana Court then attempted to distinguish this rule in so far as the Texas Transport

and Terminal Company was involved as follows (p. 752):

"The important and distinguishing feature of this case is that the business of the defendant company, *however necessary as an adjunct* to the interstate and foreign commerce of the steamship lines, is not a part of it. A tax on the business of the steamship agent *does not increase the expense or reduce the profit* of any steamship company's business. The tax is therefore not a direct hindrance or regulation of the interstate or foreign commerce of the steamship lines. If the steamship *agent were employed at a salary*, by a steamship company engaged in interstate or foreign commerce, a license tax imposed upon the local business of the steamship agent would be a tax upon the business of his principal. If, under any other arrangement between the steamship agent and his patrons, the tax imposed upon the local business done by the steamship agent *would be reflected in the expense account*, and ultimately in the profit and loss account, *of the interstate or foreign commerce of his patrons*, the tax would be a direct hindrance to their interstate or foreign commerce. But the fact that the *local business* of the steamship agents in this port and the interstate and foreign commerce of the steamship lines *are dependent* upon each other *does not make a tax upon the local business* of the steamship agents a tax upon the interstate or foreign commerce of the steamship lines. The reason is that, if the tax upon the local business

of the steamship agents affects the interstate or foreign commerce of the steamship lines at all, it does so only remotely." (Italics ours)

The Louisiana tax was upheld by the two lower courts and rehearing in the Supreme Court of the state was denied by the "Whole Court." When the case reached this court the holdings of the lower courts were reversed in *Texas Transp. Co. v. New Orleans*, 264 U. S. 150, and the imposition of the tax forbidden. The facts in *Texas Transp. Co. v. New Orleans* are strikingly similar to those here involved with the added feature that the present case is a far stronger case for the unconstitutionality of the Washington tax for two reasons:

(a) The New Orleans ordinance placed a top limit of $400.00 upon the tax. The Washington Business and Occupation Tax has no limits. It increases indefinitely with every ton of cargo handled by appellant.

(b) Many services performed by the Texas Transport Company were somewhat removed from actual transportation and might be considered only indirect elements of interstate and foreign commerce. *Appellant's operations are wholly limited to the immediate transportation of goods then moving in interstate and foreign commerce.*

In comparing the two cases the following similarities are at once apparent:

1. The Louisiana tax was a *general revenue measure* imposed upon and measured by *gross receipts.* So is the Washington tax.

2. The Texas Transport Company was a wholly *in-*

dependent local concern employed by interstate and foreign carriers to perform a local operation of shipping. The same is true of appellant.

3. The patrons of the Texas Transport Company could have installed their own offices and performed the work with their own employees. They chose however to employ a local independent company to do this work. The same is true in the instant case.

4. The services performed for a vessel by the Texas Transport Company in earlier days would have been performed by the crew of the vessel. This is likewise true of appellant's work. We submit the case is controlling.

In so far as appellant's third method of "arranging" for stevedoring is concerned, the case is conclusive.

In Di Santo v. Pennsylvania, 285 Pa. 1, 131 Atl. 489, the State of Pennsylvania had passed an act providing that no person other than railroad or steamship companies *and their agents* should engage in the sale of steamship tickets without a license. The act was aimed at curing abuses which had resulted in the defrauding of aliens and others who were often the subjects of overreaching. The object of the legislation appeared wholly commendable. Di Santo sold tickets at his own home for four steamship companies. There he received the usual advertising matter, sailing dates and ticket books from the steamship companies. There he conducted his business. His home did not bear any company name; he apparently operated it entirely at his own expense. It was first urged in the Pennsylvania court that Di

Santo was an *agent* of the steamship companies and therefore was within the exception to the provisions of the act which exempted steamship *agents* from the operation of the act. The court, however, found that he was not an *agent* or *employee* of the carrier but was a free lance or wholly *independent* operator and as such must comply. It was then urged that the application of the Pennsylvania Act would impose a burden on interstate and foreign commerce. The Pennsylvania court attempted to distinguish *McCall v. California, supra,* and *Texas Transp. Co. v. New Orleans, supra,* by stating that in the first case McCall was an *individual agent* of the interstate carrier and therefore his taxation was forbidden. The court then found that Texas Transport Co. was a *corporate agent* whose taxation was equally forbidden. The Pennsylvania court then found that Di Santo fell in an entirely different category. He was not an *agent,* individual or corporate. He was a *wholly independent local* free lance, conducting *his own business* free from interference or direction of his principal. The Pennsylvania court held that the regulation of his local independent business was not a burden on interstate of foreign commerce and that in any event such regulation was permissible under the general police power of the state. The decision of the Pennsylvania court upholding the legislation was reversed in *Di Santo v. Pennsylvania,* 273 U. S. 34. This court said (p. 37):

> "The sales here in question are related to foreign commerce as directly as are sales made in ticket offices maintained by the carriers *and*

operated by their servants and employees. The license fees and other things imposed by the act on plaintiff in error who initiates for his principal a transaction in foreign commerce constitute a direct burden on that commerce." (Italics ours)

The instant case is a far stronger case for the unconstitutionality of the Washington Business and Occupation Tax than the Pennsylvania case discussed above.

1. The Pennsylvania act might well have been considered a proper exercise of the police power of the state. No such question is here presented.

2. The requirements of the Pennsylvania act were relatively simple and the license was limited to a fee of $50.00 annually. The Washington tax has no limit and increases with every ton of cargo handled.

As a *practical matter* the requirements of the Pennsylvania act, as imposed upon a free lance solicitor of passenger traffic, are negligible in their effect on interstate and foreign commerce as compared to the gross receipts tax here involved which must be paid on each ton of cargo handled by appellant. Appellant's connection with interstate and foreign commerce is infinitely closer and more direct than that of Di Santo.

The two foregoing cases have thus conclusively settled the rule that a state may not impose a direct burden on an independent local business which constitutes an essential link in and component part of interstate and foreign commerce. The reason for the rule is, we believe, clear.

Commerce by water may be conducted by what might be termed an *integrated* operation. Here, employees of the water carrier perform each function including solicitation of cargo and passengers, collection and receipt of cargo, loading of same aboard the vessel, transporting same, discharging cargo from the vessel, delivering it to the consignee, and all the other incidental operations necessary to water transportation. It is undisputed that the gross receipts of such a water carrier derived solely from its operations in interstate and foreign commerce may not be taxed by the state. A direct tax upon such gross receipts is a direct regulation of interstate and foreign commerce and so forbidden by the Commerce Clause of the Federal Constitution.

Philadelphia S. S. Co. v. Pennsylvania, 122 U. S. 326.

Commerce by water, on the other hand, may be performed by the coordinated action of several wholly independent agencies, whose united activities constitute the through interstate or foreign movement.

The water carrier may be a smaller concern and thus unable to equip and maintain the elaborate local facilities which a larger company finds more efficient and economical. In this non-integrated operation a steamship agency may solicit, collect and receive the cargo and passengers. A local stevedoring company may load it aboard the vessel and at destination a local stevedoring company many discharge the cargo from the vessel and a local steamship agency arrange for its delivery to the consignee. Each independent operation is necessary

to the fulfillment of the interstate or foreign movement.

Commerce by water carried on by several independent agencies linked together in a non-integrated operation is entirely dependent upon the success and continued operation of each participant in the operation. A tax on the gross receipts of any independent, necessary participant in a movement in interstate and foreign commerce is a burden on the entire movement which can be no stronger than each component participant. If a state may hinder and obstruct, by regulation, taxation or otherwise, any step in the non-integrated operation, the whole movement is hindered and obstructed in like degree. This is admitted by Exhibit A, attached to the complaint (R. 8).

Appellant is a connecting carrier physically performing a part of the interstate and foreign haul. Appellant's receipts are entirely derived from transporting cargoes at the time moving continuously in interstate and foreign commerce. It is a carrier in interstate and foreign commerce.

United States v. California, 297 U. S. 175.

The state may tax property, real or personal, tangible or intangible, by a nondiscriminatory *ad valorem* tax even though used exclusively in interstate or foreign commerce.

Virginia v. Imperial Coal Co., 293 U. S. 15.

A state may impose upon a domestic corporation for the privilege of exercising its franchise a tax

measured by *net income* even though derived from interstate and foreign commerce.

Matson Navigation Co v. State Board, 297 U. S. 441.

A state may impose a privilege tax on gross receipts derived from the intrastate business of a corporation engaged in both interstate and intrastate commerce, although the effect may be indirectly to burden interstate commerce.

Pacific Telephone & Telegraph Co. v. Tax Commission, 297 U. S. 403.

The state, however, under the unanimous decisions of this court may not impose the Washington Business and Occupation Tax upon the *gross receipts* derived by appellant *solely* from *interstate* or *foreign* commerce.

C. Cases Cited by Court Below

The court below cites as authority for its decision *Ficklen v. Shelby County*, 145 U. S. 1. The discussion of this case in *Texas Transp. Co. v. New Orleans*, 264 U. S. 150, at pages 153-154, sufficiently distinguishes the *Ficklen* case. See also:

Stockard v. Morgan, 185 U. S. 27, 34;

Crew Levick v. Pennsylvania, 245 U. S. 292, 296;

Jaybird Mining Co. v. Weir, 271 U. S. 609, 620;

Di Santo v. Pennsylvania, 273 U. S. 34, 43;

Burnet v. Coronado, 285 U. S. 393, 408.

The established rule of this court is exactly contrary to that urged by the Supreme Court of the State of Washington for which it cites the case of

Ficklen v. Shelby County, 145 U. S. 1, *supra*, as authority.

In *Stockard v. Morgan*, 185 U. S. 27, the complainants were residents of Tennessee. They represented non-resident parties in soliciting orders for goods from jobbers in Tennessee. When the orders were obtained they were forwarded to their non-resident principals. If the order was accepted the goods were shipped to the local jobbers. The business of the complainants was *physically* of a local character but they were performing a function which was essential to an interstate or foreign movement. The complainants apparently conducted an independent local business, receiving a commission when they performed services. The court emphasized that it was wholly immaterial that the complainants acted for more than one patron. The court said, significantly (p. 37):

> "Although it is said in the opinion of the state court herein that the thing taxed is the occupation of merchandise brokerage, and not the business of those employing the brokers, yet we have seen from the cases already cited that when the tax is applied to an individual within the State selling the goods of his principal who is a non-resident of the State, it is in effect a tax upon interstate commerce, and that fact is not in any wise altered by calling the tax one upon the occupation of the individual residing within the State while acting as the agent of a non-resident principal. * * *
>
> "Although the State has general power to tax

individuals and property within its jurisdiction, yet it has no power to tax interstate commerce, even in the person of a resident of the State."

The theory of the court below was urged by the Circuit Court of Appeals of the Ninth Circuit in *Real Silk Hosiery Mills v. City of Portland*, 297 Fed. 897, at page 901, where the court said, in upholding a city ordinance of Portland, Oregon, imposing a general license tax on solicitors:

> "Can it be said, upon this state of facts, that the plaintiff's business in interstate commerce is subject to a burden because its *independent* solicitor, doing business in the city of Portland, as a solicitor, is required to pay a license tax and give a bond conditioned with respect to the faithful discharge of his obligations in carrying on that business?"

The same court further said (p. 903):

> "These cases, and others that might be cited, make it sufficiently plain that the freedom of interstate commerce has been judicially limited in its supposed conflict with the police power of the state to such burdens as pertain directly *to the movement of commerce* among the several states, and not to regulations governing *local business within the state*, preliminary or subsequent thereto, and does not prohibit the state by general law or local ordinance from legislating for the general welfare of the public within the state, or provide proper regulations for safeguarding the public interests or for the protection of

the public against fraud and deception, notwithstanding such legislation or regulation may indirectly affect interstate commerce." (Italics ours)

Although imposed under the police power of the state the ordinance was declared invalid by this court in *Real Silk Mills v. City of Portland*, 268 U. S. 325. The *physically local* character of the business of the independent solicitors of the Real Silk Hosiery Mills was found to be immaterial as they were performing an essential function in interstate and foreign commerce and any burden upon their operations was found to be a burden upon interstate and foreign commerce.

The court below cites:

Hump Hairpin Co. v. Emmerson, 258 U. S. 290;

Pacific Telephone v. Tax Commission, 297 U. S. 403.

They are both cases involving a taxpayer who was engaged in *both* intrastate and interstate commerce. This court upheld, in the first case, a non-discriminatory state law imposing a privilege tax based upon capital stock actually represented by property located in and business *transacted within the state* imposing the tax. In the second case, this court upheld the imposition of the same tax here involved upon the gross receipts of a telephone company derived from intrastate commerce, holding that the burden, if any, upon the interstate business of the telephone company under such circumstances were too remote to be con-

sidered. Neither case is in point in the present discussion.

Appellant is either wholly engaged in intrastate commerce and all its gross receipts taxable or appellant is wholly engaged in interstate commerce and the imposition of the tax unconstitutional. Appellant's operations fall within one category or the other.

II. IMPOSITION OF THE TAX DENIES APPELLANT THE EQUAL PROTECTION OF THE LAWS

The provisions of the Fourteenth Amendment to the Constitution of the United States forbidding a denial of the equal protection of the laws is an easy prohibition to define, but difficult to apply. In *Quaker City Cab Co. v. Pennsylvania*, 277 U. S. 389, a law of Pennsylvania created a gross receipts tax which was laid on foreign and domestic corporations engaged in the local cab business. The tax did not apply to individuals or partnerships in the same business. This court held that the statute violated the equal protection clause of the Fourteenth Amendment to the Federal Constitution, as the classification for taxation of corporations on the one hand, and individuals and partnerships on the other, in the particular case, was a distinction without a difference.

In *Colgate v. Harvey*, 296 U. S. 404, the court stated (p. 423):

> "* * * The classification, in order to avoid the constitutional prohibition, must be founded

upon pertinent and real differences, as distinguished from irrelevant and artificial ones."

In the instant case the classification is wholly unreasonable and arbitrary and without any actual basis.

A carrier conducting an integrated operation and stevedoring its own vessels pays no Business and Occupation Tax to the State of Washington. The court below holds that appellant, constituting a participant in a non-integrated movement of cargo and performing identically the same work for the vessel of another, is subject to the tax. It must be borne in mind at all times that the *integrated operation* and the *non-integrated operation* are competitors and a substantial tax on a participant in one operation necessarily weakens that operation to the advantage of its competitor.

This court in *Quaker City Cab Co. v. Pennsylvania*, 277 U. S. 389, *supra*, said, at page 402:

> "* * * The gross receipts of incorporated operators are taxed while those of natural persons and partnerships carrying on the same business are not."

So in the instant case, if a corporation owns or operates the vessel it stevedores, it pays no tax, otherwise it does.

The inequality of the above graphically illustrates the fallacy of the ruling of the court below. If stevedoring is a component part of and an essential link in interstate or foreign commerce when performed by a water carrier for its own vessels, it is neces-

sarily a component part of and essential link in interstate and foreign commerce when performed by appellant. The necessity for the work and the character of the work is exactly the same in either case. Its relation to the movement of goods in interstate and foreign commerce is identically the same.

CONCLUSION

From the foregoing we respectfully submit that the imposition of the Business and Occupation Tax of the State of Washington upon the operations of appellant violates Article I, Section 8, Clause 3 of the Constitution of the United States, and that the imposition of the tax likewise denies to appellant the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Respectfully submitted,

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APPENDIX I

Chapter 191, Laws of Washington, 1933

AN ACT relating to taxation; imposing taxes upon the privilege of engaging in business activities * * *.

Section 1. For the purposes of this act unless otherwise required by the context:

* * * * * * *

(6) The term "gross income" means the value proceeding or accruing from the sale of tangible property, real or personal, or service or both and all receipts, actually received by reason of the investment of the capital of the business engaged in, including interest, discount, rentals, royalties, fees or other emoluments however designated and without any deduction on account of the cost of property sold, the cost of materials used, labor costs, interest or discount paid or any other expenses whatsoever and without any deduction on account of losses: Provided, The term "gross income" shall not include any payments received on accounts or notes outstanding at the time this act goes into effect.

(7) The word "business" shall include all activities engaged in with the object of gain, benefit or advantage either direct or indirect, and not excepting sub-activities producing marketable commodities used or consumed in the main business activity, each of which sub-activies shall be considered business engaged in taxable in the class in which it falls.

* * * * * * * * *

Sec. 2. (2) From and after the first day of August, 1933, and until the thirty-first day of July, 1935, there is hereby levied and there shall be collected from

every person an *annual tax or excise for the privilege of engaging in business activities.* Such tax or excise shall be measured by the application of rates against values, gross proceeds of sales, or gross income, as the case may be, as follows: (Italics ours)

* * * * * * * * *

(f) (General section imposing tax of six-tenths of one per cent on businesses *not enumerated, vetoed.*)

* * * * * * * * *

Sec. 3. If any person shall engage or continue in any business or the performance of any function for which a *privilege tax* is imposed by this act, he shall be deemed to have applied for and to have duly obtained from the State of Washington *a license under this act to engage in and to conduct such business or perform such function* for the current tax year, upon the condition that he shall pay the tax accruing to the State of Washington under the provisions of this act; and he shall hereby be duly licensed to engage in and conduct such business or perform such a function. (Italics ours)

* * * * * * * * *

Sec. 5. In computing the amount of any tax * * *, there shall be excepted from gross proceeds of sales or gross income so much thereof as is derived * * * from business which the State of Washington is prohibited from taxing under the constitution of this state or the constitution or laws of the United States * * *

* * * * * * * * *

Sec. 13. * * * No restraining order or injunction shall be granted or issued by any court * * *, except upon the ground that the assessment thereof

was in violation of the constitution of the United States or that of the State of Washington.

* * * * * * * * * *

Sec. 17. Any person against whom a tax shall have been imposed as herein provided may be restrained and enjoined, * * * from engaging and/or continuing in any business for which a privilege tax is required by the provisions of this act, until such tax shall have been paid and/or until such person shall have complied with the provisions of this act.

* * * * * * * * * *

Sec. 23. It shall be unlawful for any person to fail or refuse to obtain *the license* * * *. Any person violating any of the provisions of this section shall be guilty of a gross misdemeanor and punishable in the manner provided by law. * * *

Sec. 24. The administration of this act shall be vested in and exercised by the tax commission which shall prescribe forms and rules, etc. * * *

Chapter 57, Laws of Washington Extraordinary Session, 1933

Section 1. That chapter 191 of the Laws of 1933 be, and the same hereby is, amended by adding thereto a new section, to be known as section 2-a, to read as follows:

Section 2-a. (1) From and after the first day of January, 1934, and until the thirty-first day of July, 1935, there is hereby levied and there shall be collected from every person engaging or continuing within this state in the business of rendering or performing services, professional or otherwise, and from *every person*

engaging or continuing within this state in any business not specifically taxable under section 2 of this act, *an annual tax or excise* for the *privilege of engaging* in such business; as to such persons the amount of the tax or excise shall be equal to the gross income of the business multiplied by the rate of five-tenths of one per cent; * * *. (Italics ours)

Chapter 180, Laws of Washington, 1935

AN ACT relating to revenue and taxation; providing for the levy and collection of a tax or excise upon the act or privilege of engaging in business activities; * * *.

Sec. 4. From and after the first day of May, 1935, there is hereby levied and there shall be collected from every person *a tax for the act or privilege of engaging in business activities.* Such tax shall be measured by the application of rates against value of products, gross proceeds of sales, or gross income of the business, as the case may be, as follows: (Italics ours)

* * * * * * * * *

(e) Upon every person engaging within this state in any business activity other than or in addition to those enumerated in subsections (a), (b), (c) and (d) above; as to such persons the amount of tax on account of such activities shall be equal to the gross income of the business multiplied by the rate of one-half of one per cent. This subsection includes, among others, and without limiting the scope hereof, persons engaged in the following businesses (whether or not title to materials used in the per-

formance of such businesses passes to another by accession, confusion or other than by outright sale); repairing, personal, business, professional, mechanical and educational service businesses; abstract and title, insurance, financial, brokerage, construction contracting and sub-contracting, advertising and hotel businesses.

Sec. 5. For the purpose of this title, unless otherwise required by the context:

* * * * * * * * *

(g) The term "gross income of the business" means the value proceeding or accruing by reason of the transaction of the business engaged in and includes gross proceeds of sales, compensation for the rendition of services, gains realized from trading in stocks, bonds or other evidences of indebtedness, interest, discount, rents, royalties, fees, commissions, dividends, and other emoluments however designated, all without any deduction on account of the cost of tangible property sold, the cost of materials used, labor costs, interest, discount, delivery costs, taxes or any other expense whatsoever paid or accrued and without any deduction on account of losses;

* * * * * * * * *

(m) The word "business" includes all activities engaged in with the object of gain, benefit or advantage to the taxpayer or to another person or class, directly or indirectly;

* * * * * * * * *

Sec. 12. In computing tax there may be deducted from the measure of tax the following items:

* * * * * * *

(f) Amounts derived from business which the State of Washington is prohibited from taxing under the constitution of this state or the constitution or laws of the United States.

* * * * * * * * * *

Sec. 187. If any person shall engage in any business or perform any act for which a tax is imposed by this act, he shall * * * apply for and obtain from the commission, upon the payment of a fee of one dollar, *a registration certificate* for each calendar year, or portion thereof. Said registration certificate shall be personal and non-transferable and shall expire on the last day of the calendar year for which issued and shall be renewed annually upon the condition that the taxpayer shall pay the aforesaid registration fee *and the tax accrued to the state under the provisions of this act.* * * * No person shall engage in any business taxable hereunder without being registered in compliance with the provisions of this section.

* * * * * * * * * *

Sec. 198. * * * No restraining order or injunction shall be granted or issued by any court or judge to restrain or enjoin the collection of any tax or penalty imposed by this act, or any part thereof, except upon the ground that the assessment thereof was in violation of the constitution of the United States or that of the State of Washington.

* * * * * * * * * *

Sec. 202. If any tax, increase or penalty imposed by this act, or any portion of such tax, increase or penalty is not paid within fifteen days * * *, the

tax commission shall issue a warrant * * * to the sheriff * * *, commanding him to levy upon and sell the real and/or personal property of the taxpayer found within his county * * *. If any warrant issued under this section is not paid within thirty days after the same has been filed with the clerk of the superior court, the tax commission may by order issued under its official seal, *revoke the certificate of registration* of the taxpayer * * *. (Italics Ours)

* * * * * * * * *

Sec. 207. It shall be *unlawful* for any person *to engage in business without* having obtained a *certificate of registration* as provided herein; or to *engage* in business *after* his *certificate* of registration shall have been *revoked* by order of the tax commission; * * * or for the president, vice-president, secretary, treasurer or other officer of any company to carry on the business of any company which has not obtained a certificate of registration or whose certificate of registration has been revoked by order of the tax commission * * *. Any person violating any of the provisions of this section shall be guilty of a gross misdemeanor and punishable in the manner provided by law. * * * (Italics Ours)

* * * * * * *

Sec. 216. No tax shall be imposed under the provisions of chapter 191, Laws of 1933, as amended by chapter 57, Laws of 1933, Extraordinary Session, with respect to the period beginning May 1, 1935, and ending July 31, 1935, and the provisions of such act shall be deemed amended in conformity herewith.

Nothing contained in this section shall affect the liability of any person subject to the provisions of said chapter 191, as amended, for the payment of tax imposed thereunder for any period prior to May 1, 1935, and no action or proceeding for the collection of tax, lien or claim for tax or action involving the validity of tax imposed under the provisions of said act shall be affected hereby and all remedies for the assessment and collection of taxes, penalties and interest under the provisions of said act shall be and remain in effect until such time as all taxes imposed thereunder shall have been paid or collected.